SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-484

W. A. BOYLE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITIONER'S REPLY TO "MEMORANDUM FOR THE UNITED STATES IN OPPOSITION"

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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The Petition for a Writ of Certiorari in this case was filed on September 14, 1973, and thereafter the Government filed its "Memorandum of the United States in Opposition" in which it asks for a denial of the Petition. Petitioner believes that a few brief comments in reply to the Government's opposition are appropriate.

The Constitutionality of § 610

The most noteworthy feature of the Government's Memorandum is that it does not take issue with the primary reason urged by Petitioner to support its

argument for the grant of certiorari. That reason is that the case directly presents the important First Amendment question of the constitutionality of 18 U.S.C. § 610, a question which has been specifically reserved by this Court on at least three occasions (see Petition at 8-15). At no point does the Government question either that this case squarely presents that constitutional question, or that the question is unresolved and important.

In this connection, Petitioner would also bring to the Court's attention a recent article, "Of Politics, Pipefitters, and Section 610: Union Political Contributions in Modern Context," 51 *Texas L. Rev.* 936 (1973) (see especially pp. 942, 975, 986, 984, and 993). The article contains an exhaustive analysis of § 610 and the constitutional questions it raises, and concludes:

> In 1948 or 1957 the Supreme Court could have performed a valuable service by ruling on the constitutionality of the ban on union political contributions and expenditures. If the Court ever has another opportunity, it should not shrink from the challenge, as difficult of resolution as the issues may be. [*Id.* at 993.]

Petitioner submits that this case presents that opportunity, and the Government's Memorandum does not contend otherwise.

The Failure To Show an Involuntary Source

Turning to the question of the construction of § 610, the Government argues that the Court of Appeals properly construed and applied the statute (Memorandum at 4-6). Petitioner's position on this question

is set out in the Petition (at 16-22) and need not be repeated here. In its discussion, however, the Government makes one statement that is possibly misleading and another that is flatly inaccurate, and Petitioner believes the record should be made clear on both points.

As explained in the Petition, the Union's treasury, which was allegedly the source of the challenged campaign contributions, contained some *$90 million in funds other than involuntary dues and assessments.* The Government does not deny this fact. The Government does, however, assert in response that "income made from the investment of dues" is just as much a prohibited source for contributions as are the dues themselves (Memorandum at 5, n.3). Whatever the legal merit of this position,[1] it is highly misleading to make it here, because there was no evidence in this case that the $90 million consisted of "income made from the investment of dues." The record is clear—and the Government does not directly contend otherwise—that the $90 million included voluntary contributions to the Union, proceeds from the Union's sale of a booklet, and a variety of other sources that the Government failed to identify. In short, any implication in the Government's discussion notwithstanding, the $90 million in the Union's treasury from sources other than dues and assessments was not "income made from the investment of dues."

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[1] Petitioner vigorously disagrees that this statement is legally sound. To the contrary, Petitioner believes that the *Pipefitters* decision makes clear that only involuntary dues and assessments are a prohibited source and that any income the union may derive from its investment of those dues is a proper source for political contributions by the union. As explained in the text above, however, this question is not presented in this case.

The flatly inaccurate statement in the Government's Memorandum occurs in the same footnote discussed above (Memorandum at 5, n.3). This statement deals not with the question of the sources of the funds in the Union's treasury, but rather with the question of tracing the funds from the Union's treasury to the League, the organization that actually made the contributions. The Government contends that "only $2,600" of the League's funds was not "definitely identified" as either money transferred from the Union or earnings on amounts transferred. The fact, however, is that the Government's expert witness did not even examine the League's records prior to January 1, 1943, and the League had more than $30,000 in its bank account as of that date (J.A. 131-32). Thus, there was not even an attempt to identify the source of that amount. Second, an additional amount in excess of $28,000 was not shown to have been transferred from the Union, and the Government's witness did not testify that this amount was earnings on the amount transferred. Instead, the witness stated simply that "the majority" of this amount consisted of "advances to employees of the League, redemption of U.S. Savings Bonds, proceeds of sale of equipment, furniture, refunds and advances for football tickets and miscellaneous nature" (J.A. 134).

Issues Under 29 U.S.C. § 501(c) and 18 U.S.C. § 371

The Petition also raises issues with respect to the Court of Appeals construction of 29 U.S.C. § 501(c) particularly the conflict with the Second Circuit's *Silverman* decision, and with respect to application of the federal conspiracy statute, 18 U.S.C. § 371 (Petition 22-28). On both of these issues, the Government's Memorandum basically relies upon the conten-

tion that the Court of Appeals decision was correct (Memorandum at 6-7). Because the Memorandum thus raises no new issues, a reply is unnecessary other than to refer to the arguments on these issues as set out in the Petition (at 22-28).

Conclusion

In conclusion, Petitioner submits that the Government's Memorandum does not controvert the basic thrust of the Petition, namely, that this case presents substantial federal, constitutional and statuory issues of such importance as to justify this Court's consideration. Accordingly, Petitioner urges the Court to grant the Petition for a Writ of Certiorari to review the decision below of the United States Court of Appeals for the District of Columbia Circuit.

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